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5 MARTIN J. BIBBS,  
6 Plaintiff,  
7 v.  
8 MICHAEL C. SAYRE, M.D., et al.,  
9 Defendants.  
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Case No.: C 13-1570 CW (PR)  
11  
12 ORDER GRANTING DEFENDANTS'  
13 MOTIONS FOR PROTECTIVE ORDER  
14 AND TO CONVERT RULE 12(B)  
15 MOTION INTO MOTION FOR SUMMARY  
16 JUDGMENT  
17  
18 Doc. Nos. 35 and 45

19 Plaintiff, a state prisoner incarcerated at Pelican Bay State  
20 Prison (PBSP), has filed a pro se civil rights action pursuant to  
21 42 U.S.C. § 1983, alleging the violation of his constitutional  
22 rights by medical staff at PBSP. On March 14, 2014, Defendants  
23 filed a motion to dismiss for failure to exhaust administrative  
24 remedies and for failure to comply with the requisite statute of  
25 limitations, see doc. no. 29, and a motion for a protective order  
26 to stay discovery, see doc. no. 35. Plaintiff has not opposed the  
27 motion for a stay of discovery. On April 22, 2014, Defendants  
28 filed a motion to convert their motion to dismiss into a motion  
for summary judgment. See doc. no. 45.

Defendants request a stay of discovery until their motion  
based on failure to exhaust and failure to comply with the statute  
of limitations is decided by this Court. They argue that  
Plaintiff has served Defendants with discovery requests, but that  
the requests concern the factual issues of his Eighth Amendment  
deliberate indifference claims against Defendants and do not bear

1 on the procedural issues of whether his claims are exhausted or  
2 his complaint is time-barred. For good cause shown, the Court  
3 grants Defendants' motion for a stay of discovery until their  
4 motion on procedural issues is adjudicated. See Fed. R. Civ. P.  
5 26(c) (court may issue protective orders to stay discovery for  
6 good cause); Fed. R. Civ. P. 26(b)(2)(c)(iii) (court may limit  
7 discovery when burden or expense of proposed discovery outweighs  
8 its likely benefit). If the Court does not grant judgment in  
9 favor of Defendants on procedural grounds, the stay will  
10 automatically be lifted and discovery will proceed in accordance  
11 with the Rules of Civil Procedure.

12 In their motion to convert their motion to dismiss into a  
13 motion for summary judgment, Defendants cite Albino v. Baca, 2014  
14 WL 1317141, \*6, 8 (9th Cir. Apr. 3, 2014) (en banc), in which the  
15 Ninth Circuit held that a challenge to exhaustion of  
16 administrative remedies must be brought in a summary judgment  
17 motion under Federal Rule of Civil Procedure 56. Pursuant to  
18 Albino v Baca, and for good cause appearing, the Court grants  
19 Defendants' motion.

20 Plaintiff has previously filed an opposition addressing the  
21 exhaustion and timeliness arguments asserted in Defendants' motion  
22 to dismiss. Plaintiff may, but is not required to, file a  
23 supplemental opposition to Defendants' summary judgment motion.  
24 If Plaintiff decides to file a supplemental opposition, he is  
25 granted thirty days in which to do so. If Plaintiff decides not  
26 to file a supplemental opposition, he shall file a declaration  
27 with the Court so stating.

1 CONCLUSION

2 Based upon the foregoing, the Court orders as follows:

3 1. Defendants' motion for a stay of discovery until the Court  
4 adjudicates their motion for summary judgment is granted. If  
5 Defendants' motion is denied, the stay shall be vacated and  
6 discovery shall proceed in accordance with the Federal Rules of  
7 Civil Procedure without further order of the Court.

8 2. Defendants' motion to convert their motion to dismiss into  
9 a motion for summary judgment is granted.

10 3. Within thirty days from the date of this Order, Plaintiff  
11 shall either file a supplemental opposition to the summary  
12 judgment motion or a declaration stating that he does not wish to  
13 do so. Defendants shall file a reply in response to Plaintiff's  
14 opposition and supplemental opposition within fourteen days from  
15 the date he either files his supplemental opposition or his  
16 declaration.

17 4. This Order terminates docket numbers 35 and 45.

18 IT IS SO ORDERED.

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20 Dated: 5/27/2014

21   
22 CLAUDIA WILKEN  
23 UNITED STATES DISTRICT JUDGE  
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